United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

NO. 75-4116

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and W.J. USERY, SECRETARY OF LABOR,

Respondents,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC AND ITS LOCAL NO. 301,

Intervenors.

BRIEF FOR THE SECRETARY OF LABOR

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Citations

Cases

Statutes and Regulations

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Intervenors.

ON PETITION TO REVIEW AN ORDER OF
THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

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*/ Mr. Usery succeeded Mr. Dunlop as Secretary of Labor February 10, 1976. Fed. R. App. P.43(c).

COUNTERSTATEMENT OF ISSUES PRESENTED

Section 17(a) of the Occupational Safety and Health Act, 29 U.S.C. 666(a), provides that "Any employer who willfully or repeatedly violates the requirements of...any standard...promulgated pursuant to section 6 of this Act, ...may be assessed a civil penalty of not more than $10,000 for each violation." Section 17(k), 29 U.S.C. 666(j), defines a "serious" violation as one which creates "a substantial probability that death or serious physical harm could result ...unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Section 5(a)(2), 29 U.S.C. 654(a)(2), requires that "Each employer shall comply with occupational safety and health standards promulgated pursuant to this Act." In April 1973 General Electric's Schenectady turbine works was cited for a repeated serious violation of 29 CFR 1910.133(a), the Secretary's eye protection standard, for permitting employees to break up concrete using pneumatic hammers without wearing protection against possible blinding from flying particles. The alleged violation was substantially identical in facts and nature of the hazard to one previously cited and ordered abated in the same building 15 months before. The company was also cited for a willful serious violation of 29 CFR 1910.23(c)(1), requiring employees working on platforms over four feet high to be protected against falls by guardrails on all open sides. The issues presented are:

1. Whether substantial evidence supports the Commission's finding that GE's second substantially identical violation of 29 CFR 1910.133(a) was a repeated serious violation of the Act.

2. Whether substantial evidence supports the Commission's finding that GE committed a willful serious violation of 29 CFR 1910.23(c)(1) by knowingly permitting employees access to work on an elevated powered platform without standard guard rails.

COUNTERSTATEMENT OF THE CASE

1. Nature of the case

This case is before the Court pursuant to section 11(a) of the Occupational Safety and Health Act of 1970 (OSHA) (84 Stat. 1590, 29 U.S.C. 651 et seq.)on petition of General Electric Company to review an order of the Occupational Safety and Health Review Commission issued against it on April 21, 1975. This Court has jurisdiction under 29 U.S.C. 660(a), the violations found having occurred in Schenectady, New York.

2. Facts found by the Commission

A. Background

The facts are generally undisputed. General Electric, one of the nation's largest manufacturers, maintains a large industrial complex in Schenectady, New York employing over 27,000 workers who produce a variety of

electrical products for industrial and home use (A. 345a, 370a, 391a, 283a, 306; 86a-87a, 252a).[1/] Of these 27,000 workers, 13,000 are union-represented, the vast majority--11,000-- by Local 301 of the International Union of Electrical Radio and Machine Workers (IUE) (A. 283a; 86a). The Union has one safety director, Larry Rafferty, who by agreement with GE has overall safety responsibility for all the IUE-represented workers. GE also has a general safety director, David Guilbault (A. 391a, 284a; 75a, 83a, 93a, 153a). There is, however, no direct contact between these management and union safety representatives. Instead management requires that Rafferty "go to Union Relations people, or the people that are dealing in the interpretation of the contract, or grievance operations." GE is accordingly apprised of safety problems by the union solely within the collective bargaining process (A. 391a; 96a). The Union has conducted frequent safety inspections of the facility to bring hazards to GE's attention, has struck over safety issues, and has filed complaints with OSHA requesting inspections of the facility (A. 103a, 122a-127a, 137a, 149a).

1/ "A." references are to the Appendix filed by petitioner in this case. Those preceding a semicolon are to the pleadings and the Commission's findings and conclusions; those following, to the supporting evidence; "S.A." references are to the supplementary appendix, also filed by the petitioner.

Prior to the inspection in the instant case the Secretary had inspected GE on December 2, 1971, February 29, 1972 and March 12, 1973. On all these occasions GE was cited for violations of numerous safety and health standards and issued proposed penalties and abatement dates which were not contested and became final unreviewable Commission orders by operation of law (A. 366a-367a, 284a, 296a; 155a, 259a-268a). See 29 U.S.C. 659(a). In particular, GE was cited as a result of the 1971 inspection for failure to comply with 29 CFR 1910.133(a) in Building 273 because "Employee, Bay C-15, operating air chipping hammer, was without suitable eye protection" (A. 366a-367a; 259a-263a). In addition, as a result of both the 1971 and March 12, 1973 inspections GE was cited for various guarding violations of 29 CFR 1910.23(c)(1). This violation and the content of 23(c)(1) were expressly brought to the attention of GE's safety director at the conference closing the March 12, 1973 inspection (A. 379a; 59a, 266a). 2/

2/ GE had repeatedly been placed on notice of the requirements of 29 CFR 1910.23(c)(1) prior to this inspection. During the 1971 inspection the compliance officer observed numerous violations of this standard and informed GE officials he would issue a formal citation for one or two of these and point out others, specifying that all such violative conditions should be corrected (A. 183a). During the summer of 1972 the same compliance officer spoke on eight different occasions to more than 1500 management personnel at the Schenectady complex, discussing selected pertinent standards, including requirements for guarding the edges of raised work platforms (A. 189a). Finally, the Union's safety director repeatedly brought instances of violation of the standard to GE's attention (A. 109a-117a, 184a, S.A.).

B. The Instant Inspection

In response to a complaint filed by Local 301 stating that various safety hazards existed at the Schenectady complex and management was unresponsive to Union requests to correct them, two OSHA compliance officers inspected the Steam Turbine and Generator Products Division at buildings 273 and 52 of the Schenectady complex on March 21 and 22, 1973 (A. 345a, 306a; 94a-95a; 122a-129a). 3/ They were accompanied throughout by the Union's safety director and assistant safety director and two GE representatives, and were joined from time to time by others, generally the foreman in the immediate area of inspection (A. 391a, 284a; 99a). As the inspection party moved through building 273 it observed two employees in plain view using a pneumatic hammer to "bust...out a [concrete] foundation" without any eye protection. While this operation was observed pieces of concrete were "moving in all directions" and "there was a possibility of being struck in the eye by the flying concrete" (A. 366a, 308a, 330a; 43a-44a, 62a). It was undisputed that applicable OSHA forms kept by GE disclosed numerous eye injuries to employees; that the GE foreman responsible for supervising the exposed employees regularly observed six safety violations a day at Schenectady, most of which were violations of safety glass regulations; and that neither this foreman nor any other was anywhere near the exposed employees' work area (A. 391a; 41a, 46a, 52a, 158a-171a). Although the employees breaking concrete had

3/ See section 8(f)(1), 29 U.S.C. 657(f)(1).

been supplied with protective glasses and were immediately told to discontinue work until they were worn, these glasses did not have safety side shields described as suitable eye protection for the relevant activity by OSHA regulations (A. 170a). 4/

In building 273 the inspection party also observed a powered mobile work platform which could be raised up to 10 feet and was used to weld turbine shells at heights of six, eight and ten feet (A. 381a, 302a; 104a-105a). The platform was parked next to an aisle near the foreman's office, was readily visible to supervisors, and was equipped with sockets for installation of removable guardrails (A. 305a; 182a). While the platform was not in use during the inspection, it was undisputed that it was used about once a month for two or three days at a time; that employees had regularly been observed working on the platform at heights of six to eight feet; and that the company had "had to talk to people about their failure to use...[guard] rails" when working on it (A. 371a; 63a, 105a, 224a-226a). When the inspectors noted the absence of the railings which fit into this platform's sockets they were told the railings. "were around."

4/ Appropriate eye protection equipment was ultimately supplied to G E employees after the inspection (A. 367a, 297a; 239a).

When they asked to see those railings, they could not be produced despite the fact that GE had been cited for violating the same standard both in 1971 and the previous week and GE's safety director had been present at the most recent previous inspection (A. 302; 55a, 59a, 109a-112a, 179a-181a, 185a, 186a).

3. Administrative proceedings

As a result of this March 21-22 inspection and review of GE's prior history of violations, including earlier uncontested citations under 29 CFR 1910.133(a)(1) and 23(c)(1) and the fact that GE's safety director was personally aware of the latter standard due to his presence during the March 12 inspection, the Secretary on April 16, 1973 cited GE for a repeated serious violation of 133(a) and a willful serious violation of 23(c)(1) for failing to require use of protective eye equipment and standard railings on a powered work platform, respectively (A.345a-346a,366a,379a). The company was also ordered immediately to abate these violations and served with respective proposed penalties of $2,000 and $5,000 for them (A. 346a,348a,273a,275a). GE timely contested the citations pursuant to 29 U.S.C. 659(c), the Secretary's formal complaint and GE's answer before the Commission followed, and a lengthy hearing was held in June 1973 before a Commission administrative law judge sitting in Schenectady.

5/ See page 8 for entire footnote.

5/ Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2), requires all employers affecting interstate commerce to comply without qualification "with occupational safety and health standards promulgated under this Act." See also 29 U.S.C. 651(3), 652 (5). 29 CFR 1910.133(a)(1) provides that "Protective eye... equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. In such cases, employers shall make conveniently available a type of protector suitable for the work to be performed, and employees shall use such protectors. No unprotected person shall knowingly be subjected to a hazardous...condition. Suitable eye protectors shall be provided where machines or operations present the hazard of flying objects...." In addition, 29 CFR 1910.132(a) generally provides that appropriate "personal protective equipment for eyes...shall be provided, used, and maintained in a...reliable condition...wherever it is necessary by reason of hazards...encountered in a manner capable of causing injury or impairment in the function of any part of the body through...physical contact."

29 CFR 1910.23(c)(1) provides with respect to "protection of...open-sided...platforms" that "Every open-sided...platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the [specified] equivalent...) on all open sides..." 29 CFR 1910.21(a)(4) defines a platform for purposes of this standard as "A working space for persons elevated above the surrounding floor...such as a balcony or platform for the operation of machinery or equipment."

As noted supra, p. 2, section 17(a) authorizes a discretionary penalty of up to $10,000 for each instance in which an employer willfully or repeatedly violates the requirements of...any standard." Sections 17(b) and (k) direct mandatory penalties of up to $1,000 per occurrence for serious violations, defined as those which create substantial probability of serious harm "unless the employer did not, and could not with the exercise of reasonable diligence, know of" their presence. Section 17(c), 29 U.S.C. 666(c), defines a nonserious violation as one which is "not...serious."

GE was also cited for numerous violations of other standards in buildings 273 and 52, including two serious violations, three repeated nonserious violations, and four simple nonserious violations (A. 346a-349a, 271a-276a). These citations were generally affirmed by the Commission and are not before the Court.

At this hearing GE principally contended there was neither a serious nor nonserious eye protection violation because it had a rule requiring use of safety glasses, and had fired one employee for failure to wear his. While admitting the generic hazard may have been foreseeable, the company asserted the specific cited instance was not and there was accordingly no violation since it neither knew nor could reasonably have discovered the violation's presence. The company further claimed there was no "repeated" violation because the violative conduct did not result from its deliberate defiance of the prior order. With respect to the willful serious guarding citation, GE principally asserted there was no violation because 1910.23(c)(1) was inapplicable to the cited platform and the Secretary did not prove any violation occurred within six months of the date his citation issued. See 29 U.S.C. 658(c). It also contended that even if a violation occurred it was not serious or willful because there was neither evidence anyone had been injured by falling from the platform nor proof of the company's bad purpose or evil motive.

The judge's decision affirming the repeated serious violation but reducing the accompanying penalty to $100, and vacating the willful serious violation, issued November 19, 1973. Both former Chairman Moran and former Commissioner Van Namee directed discretionary review by the full Commission pursuant to 29 U.S.C. 661(i), and the Commission's decision

affirming the judge's repeated serious finding; reinstating the proposed $2,000 penalty for that violation; reversing the judge's willful serious vacation; and affirming that violation with a $2,000 penalty, followed (A. 393a).

4. Decisions below

On the above record the judge found that two GE employees were using a jack hammer to break up a concrete floor in plain view of supervisory personnel without protective eye equipment and GE was clearly in serious violation of 29 CFR 1910.133(a) due to the chance of their being "struck in the eye by flying concrete" and blinded (A. 295a-296a, 330a; 43a, 236a). He also found that the violation was repeated due to a pre-existing final order against GE for violation of the same standard on virtually identical facts, noting that "Since the same standard involving an almost identical factual situation was involved in the two violations there can be no question but that they are repeated" (A. 330a; 43a; 259a-263a). However, he reduced the proposed penalty from $2,000 to $100 on factual determinations that GE had a relatively good safety program and the violation was not an "isolated occurrence...[but] is due in major part to employee lapse" (A. 331a).

With respect to the guardrail willful serious citation, the judge rejected GE's contention that a willful finding required a showing of bad purpose or evil motive, holding that under remedial civil legislation willful action is

"intentional, knowing and voluntary as distinguished from accidental, and...may be conduct characterized by careless disregard" (A. 334a). But he vacated the citation on the narrow ground that the "elevator was not seen in operation" by the inspectors and "the unguarded powered work platform standing alone is insufficient to establish the violation" (A. 337a). He further noted that the record did not "establish a violation within the citable [six-month] period," apparently holding the lack of testimony to a specific date fatal despite evidence unguarded use regularly occurred (A. 338a).

On review the Commission affirmed the judge's serious repeated findings under 133(a)(1) "because at the time of inspection two employees were observed breaking up concrete with a pneumatic hammer without proper eye protection," a previous final order for a virtually identical violation existed, and GE could with "reasonable diligence" have discovered the violation because the employees were working in plain view (A. 366a). Holding that the standard "clearly directs employers to require that employees use such protection, because under its express terms no person is knowingly to be subjected to a hazardous eye condition," the Commission specifically rejected arguments that the violation was "isolated" and its holding made GE "an absolute guarantor" of employees' compliance, expressly finding that (A. 366a-367a).

> The violations were preventable. The record supports the conclusion that, although General Electric is making an effort to promote the

> use of protective eye equipment, its efforts have not gone far enough. In fact, both employees and employer representatives testified that the failure to use protective eye equipment continues, albeit in rare instances, throughout Buildings 52 and 273.

With respect to the willful guarding citation under 23(c)(1), the Commission adopted the judge's definition of willfulness but reversed his dismissal of the Secretary's citation, noting that "the record clearly supports a willful allegation [since] the respondent [as recently as 10 days before the instant inspection] had been previously cited for violation of the same standard"; that citation went uncontested and became an unreviewable final order of the Commission; and GE's safety director had been present at the earlier inspection and was fully aware of the standard's requirements (A. 379a, 391a). The Commission further noted that GE's attempt to establish the cited platform was not used without guardrails within six months of citation was directly refuted by uncontradicted testimony that it had been seen in unguarded use at heights of 6 and 8 feet and was "regularly in use" two or three days per month (A. 381a; 226a). It accordingly found actual employee exposure during the limitations period to the "risk of falling" from the platform and sustaining serious injury (A. 381a).

Moreover, the Commission explicitly increased the penalty for the repeated serious eye violation from the $100 assessed by the judge to $2,000 because of GE's lack of good faith, finding (A. 391a):

> The "good faith" of General Electric has been put into issue by the Union. The transcript reveals that its contentions are well taken. The Secretary established a substantial number of repeated safety violations. The Union presented its safety director who testified at length concerning company-union safety relations. He established there was no direct contact between management responsible for safety and the Union safety director. All such contact was instead channeled through Union relations personnel. Although all of the above was established, respondent did not call as rebuttal witnesses the two officials responsible for worker safety and health in Schenectady. The evidence further reveals that General Electric was aware of ongoing violations, and applied little or no additional effort to see that they were eliminated.

The Commission additionally assessed a $2,000 penalty for the reinstated willful serious violation of 1910.23(c)(1), justifying this levy of only one-fifth the permissible maximum on the ground that "the gravity of the powered work platform violation is moderate in that the working height of the platform did not exceed 10 feet"(A. 393a). And it ordered the company immediately to abate both violations (A. 367a, 382a).

Finally, in order to assure complete abatement of these and other proven violations, many of which were serious or repeated, the Commission pursuant to its authority to direct "other appropriate relief," 29 U.S.C. 659(c), ordered GE to cease and desist "from its policy of unilaterally establishing health and safety programs without the advice, consent and participation of the [Union]" and to consult the Union regarding "matters of employee safety...limited to those covered in

affirmed citations...in this proceeding" (A. 387a-388a). 6/

The company's petition to review these two narrow and essentially factual aspects of this wide-ranging proceeding followed.

6/ The Commission also rejected several far broader requests for ancillary affirmative relief, including Union requests for costs and a "like or related" abatement order covering all GE's plants nationwide (A. 389a-390a).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT GE COMMITTED A REPEATED SERIOUS VIOLATION OF 29 CFR 1910.133(a), THE SECRETARY'S EYE PROTECTION STANDARD

1. As shown supra, in April 1973 the Secretary cited GE for a repeated serious violation of 1910.133(a) for permitting two employees "busting out a [concrete] foundation with a pneumatic hammer" and exposed to flying concrete chips to work without protective eye equipment. 7/ The judge and Commission affirmed this citation and the record fully supports this result. Thus, the uncontradicted evidence shows that during the March 12 inspection the OSHA inspection party observed two employees who were not wearing any eye protection using a jackhammer to break up a concrete floor. These employees were working in plain view of anaisle in building 273 and were continuously exposed to the possibility of serious eye injury from pieces of concrete shot into the air as a result of their

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7/ This Court has frequently examined the Act's remedial purposes, broad scope, and operation in enforcement contexts, which need not be reiterated here. E.g., Brennan v. OSHRC and Underhill Const'n. Corp., 513 F.2d 1032 (C.A. 2, 1975); REA Express v. Brennan and OSHRC, 495 F.2d 822 (C.A. 2, 1974); Brennan v. OSHRC and John J. Gordon Co., 492 F.2d 1027 (C.A. 2, 1974). See generally National Realty and Const'n. Co. v. OSHRC and Secretary, 489 F.2d 1257 (C.A. D.C., 1973); Brennan v. Butler Lime and Cement Co. and OSHRC, 520 F.2d 1011 (C.A. 7, 1975).

drilling. On these facts[8/] there can be no question that a serious violation of 133(a) occurred, since there was a "substantial probability that . . . serious physical harm" could result from contact between eyes and flying concrete due to the absence of prescribed safety glasses. See National Realty and Const'n. Co. v. OSHRC and Secretary, 489 F. 2d 1257 at n. 33 (C.A. D.C., 1973); California Stevedore and Ballast Co., v. OSHRC, 517 F. 2d 986, 988 (C.A. 9, 1975). It is equally clear as a factual matter that the violation was "repeated," since GE had previously been cited for a violation of the same standard in the same building in December 1971; that citation became final and conclusive by operation of law;[9/] and the judge expressly found that because the instant citation involved "an almost

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8/ One of the employees testified he was wearing safety glasses when observed by the inspection party. The judge's contrary finding, based on the testimony of various inspection party members (A. 295a-297a), is a "resolution... essentially non-reviewable unless contradicted by 'uncontrovertible documentary evidence or physical facts" not present here. Olin Construction Co. v. OSHRC and Brennan, 525 F. 2d 464, 467 (C.A. 2, 1975).

9/ See 29 U.S.C. 659(a), 660(b); Brennan v. Winters Battery Mfg. Co., __F. 2d___(C.A. 6, No. 75-1367, Dec. 18, 1975), 3 CCH ESHG Para. 20, 244; Atlas Roofing Co. v. OSHRC and Department, 518 F. 2d 990, 1012 (C.A. 5, 1975), petition for cert. granted on another issue, No. 75-146 (March 22, 1976); Frank Irey, Jr., Inc. v. OSHRC. 519 F.2d 1200, 1206 (C.A. 3, 1974, affirmed en banc July, 1975), petition for cert granted on another issue, No. 75-748 (March 22, 1976).

identical fact situation . . . there can be no question but that [it was] repeated" (A. 330a). The Commission's determination that GE committed a serious repeat violation was accordingly supported and should be affirmed. N.L.R.B. v. United Ins. Co., 390 U.S. 254, 260 (1968); Olin Const'n Co. v. OSHRC and Brennan, supra n. 8.

2. No different result is required by GE's contention (Br. 9-11, 22-30) it did not violate 133(a) because the Commission had previously indicated in Cam Industries[10/] a belief that this standard only requires employers to make protective glasses available rather than insure their use. The short answer is that even under Cam Industries there was a violation, since undisputed evidence shows the glasses GE furnished these employees were inadequate for their normal operations (A. 367a, 297a; 170a). Moreover, the Commission expressly overruled this aspect of Cam, noting that "Stare decisis is a principle of policy and not a mechanical formula of adherence to the [most recent] decision"; under this Act Congress clearly intended to make "Final responsibility for compliance [by his employees] rest . . . with the employer"; and adherence to Cam would "involve collision with an approach [in the instant case] that is intrinsically sounder and verified by experience" (A. 367a). As the Supreme Court recently

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10/ OSHRC No. 258, 1973-74 CCH OSHD Para. 17,373 at n. 2 (1974).

observed in approving the NLRB's changed interpretation of employer responsibilities under the NLRA:

> The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the . . . law would misconceive the nature of administrative decision making. "'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative process from the judicial process." [citation omitted]
>
> The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board . . . It is the province of the Board, not the courts, to determine whether or not the "need" [to alter existing decisional law] exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations. For the Board has the "special function of applying the general provisions of the Act to the complexities of industrial life . . ., and its special competence in this field is the justification for the deference accorded its determination [citation omitted]. Reviewing courts are of course not to "stand aside and rubber stamp" Board determinations that run contrary to the language or tenor of the Act . . .. But the Board's construction here, while it may not be required by the Act, is at least permissible under it [and accordingly should be dispositive].

N.L.R.B. v. Weingarten, Inc., 420 U.S. 251, 265-267 (1975). Accord: N.L.R.B. v. A.P.W. Products Co., 316 F.2d 899, 904-905 (C.A. 2, 1963); Fraenkel v. U.S., 320 F.Supp. 605, 608 (D.N.Y. 1970). These principles apply a fortiori where the Commission not only determined on the record that its changed interpretation was "verified by experience," but construed 133(a) in the manner required by its purpose and Congress' intent to place ultimate responsibility for compliance with such requirements on employers alone.[11/]

Thus the standard's clear purpose is to prevent the possibility of eye injuries by effectively deployed safety

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11/ As the Congress repeatedly noted in passing this legislation,

> Employers have primary control of the work enviroment and should insure that it is safe and healthful.
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> ***
>
> The Committee does not intend the employee-duty provided in section 5(b) to diminish in any way the employer's compliance responsibilities or his responsibility to assure compliance by his own employees. Final responsibility for compliance with the requirements of this Act remains with the employer.

Committee Print, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92nd Cong. 1st Sess. 149, 150-151 (1971) (emphasis added) (hereafter "Leg. Hist.") All emphases in subsequently - quoted material are those of counsel for the Secretary unless otherwise indicated.

equipment--a purpose wholly inconsistent with a requirement limited to providing equipment irrespective of whether it is used. More specifically, the standard's language does not expressly place any obligations on employees, but does place express obligations on employers. And while it does not in haec verba state that employers shall assure the use of equipment, it both requires them to provide it and states that "No unprotected person shall knowingly be subjected to a hazardous . . . condition." This latter provision would be both meaningless and superfluous if it did not make employers responsible for assuring use of the protective equipment required to be provided. This is especially true in light of the settled meaning of 29 CFR 1910.132(a), which generally requires that "protective equipment, including personal protective equipment for eyes...shall be provided, used, and maintained...."; like 133(a) does not specify whether employers or employees have the use obligation; but has uniformly been held to require employers both to provide and insure employee use of the specified equipment. Eg., The Budd Co. v. OSHRC, 513 F. 2d 201, 205-206 (C.A. 3, 1975); Ryder Truck Lines v. Brennan, 497 F. 2d 230, 232-233 (C.A. 5, 1974).

In short, the Secretary and Commission simply read 133(a) consistently with 132(a). Particularly in light of the courts' repeated holdings that congruent interpretations of standards by these two agencies are virtually dispositive, The Budd Co. v. OSHRC, supra, 513 F. 2d at 204-205; Clarkson Const'n. Co. v. OSHRC and Secretary,--F.2d--, 3CCH ESHG Para. 20,317 (C.A. 10, No. 75-1070, Jan. 21, 1976), that reading should forthwith be affirmed. An opposite result would contradict the 132(a) requirement that employers assure employee use of protective eye equipment, and would "eviscerate" the regulation by permitting employers to evade necessary safety obligations simply by making protective equipment available for use at workers' whim. Brennan v. Southern Contractors and OSHRC, 492 F.2d 498, 501 (C.A. 5, 1974). See Brennan v. OSHRC and Gerosa, Inc., 491 F.2d 1340, 1344 (C.A. 2, 1974) (OSHA standards must be interpreted to avoid insofar as possible the fact that "there will always be employees who are inexperienced or inclined to neglect their [safety] duties").[12/]

12/ Relying on the First Circuit's opinion in Cape and Vineyard Div. v. OSHRC, 512 F. 2d 1148, 1152 (1975), GE correlatively contends the standard as interpreted by the Commission (Br. 27) is unconstitutionally vague. That case is doubly inapposite. It neither treated nor intimated any vagueness in the 132(a) requirement that employers assure

(12/ continued on page 21(a)).

12/ (cont'd.)

the use of protective equipment, but dealt only with the specificity of that standard's language defining the "hazard of environment" triggering the employer's duty. Moreover, it rested on the Secretary's simple failure to show the employer should have known what precise equipment was required. Unlike 132(a), the instant standard applies only to eye protection and specifies the equipment required. Furthermore, GE has not only failed to assert any difficulty in determining what 133(a) required, but was aware as early as the Secretary's 1971 citation that he interpreted this standard to require employers to assure worker use of eye protection. Supra, pp.10-11,16. In light of the manifest reasonableness of that interpretation, supra, pp.19-21, the company's vagueness claim is meritless. E.g., U.S. v. Petrillo, 332 US 1, 6-7 (1947); Ryder Truck Lines v. Brennan, supra.

3. Nor is a different result required by GE's lengthy contention (Br. 30-37) there was nevertheless no violation because the company had a program requiring that glasses be worn, had fired one employee for failure to wear glasses, and the instant violation was an unpreventable instance of employee misconduct. Insofar as the contention is that GE neither knew nor with reasonable diligence could have known of the violation's presence it is irrelevant, since as noted supra, pp. 5-6, the glasses GE furnished these employees were inadequate to protect them against flying chips which were a normal part of their work---facts which per se rendered the violation foreseeable and preventable. E.g., Brennan v. OSHRC and Alsea Lumber Co., 511 F.2d 1139 at n. 5 (C.A. 9, 1975); see Brennan v. Butler Lime and Cement Co. and OSHRC, 520 F.2d 1011, 1017 (C.A. 7, 1975). Insofar as the contention assumes the specific mode of violation must be foreseeable it is erroneous. The courts have repeatedly held that under section 17(k) only the generic hazard proscribed by the standard need be foreseeable: that knowledge of facts indicating employees' eyes may not adequately be protected will charge their employer with affirmative safety duties; and that GE's awareness of continuing lapses in eye protection was sufficient irrespective of whether these two workers' "misconduct" could have been predicted at the time. See, e.g., Brennan v. Butler Lime, supra; Brennan v. OSHRC and

Vy Lactos Laboratories, 494 F.2d 460, 463 (C.A. 8, 1974); National Realty, supra, 489 F.2d at 1265-67 and nn. 34, 36-37. Cf. Brennan v. OSHRC and Underhill Const'n. Corp., 513 F.2d 1032 (C.A. 2, 1975).

More importantly, whether an employer knew or could have known of the violation is "essentially...a question of fact for...the administrative triers," Atlas Roofing Co. v. OSHRC, supra, 518 F.2d at 1013 , whose supportable determination should be affirmed even if the Court would reach a different result de novo. E.g., N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404, 408 (1962); Olin Const'n. Co. v. OSHRC and Brennan, supra. The unanimous findings of the Judge and Commission that the instant violation was foreseeable and preventable were plainly supported here. In the first place, as the Commission noted (A. 366a), this violation involved two employees working in plain view and ostensibly supervised by a foreman who had personally observed numerous eye-safety violations on a daily basis—facts which themselves justify the Commission's finding the violation could reasonably have been discovered. Second, while GE holds up its eye-protection program as a shield to show the violation was unpreventable, the record plainly supports the contrary inference. Not only had similar violative conditions been regularly observed by the supervisor responsible for these workers, but the company had previously been found in violation of the same standard and its records

showed numerous eye injuries to employees engaged in similar occupations (A. 230a, 233a, 158a, 161a). 13/ Finally, the single discharge relied upon by GE occurred when an employee cursed a supervisor, threw down his glasses, and "stomped" on them (A. 152a); and the record as a whole demonstrates a policy of benign neglect despite the company's continuing notice its rule requiring use of glasses was regularly being transgressed. The Commission's finding that the violation was preventable because in the face of this notice GE "applied

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13/ We particularly note GE called only one building 273 supervisor, whose testimony plainly indicated GE's continuing awareness of safety glass violations. That GE called no other supervisors raises at least an inference that their testimony would have been equally damaging. Cf. Interstate Circuit, Inc. v. U.S., 306 U.S. 208, 225-226 (1939); N.L.R.B. v. Dorn's Transp. Co., 405 F.2d, 706, 713 (C.A. 2, 1969).

little or no additional effort to see that [these lapses] were eliminated" (A. 391a), was therefore correct and should be affirmed. 14/

14/ GE further contends (Br. 31-34, 38 passim) this violation was an "isolated incident," makes the company an insurer of employee conduct, and should be vacated because the Secretary did not prove what further feasible steps could have been taken. These contentions are untenable. The Commission supportably found the violation was "repeated," let alone not isolated (A. 366a-368a); and an employer is plainly not an "insurer" subject to "strict liability" where employee misconduct was preventable. See, e.g., National Realty, supra, 489 F.2d at 1265-66; Brennan v. Butler Lime, supra; REA Express v. OSHRC and Brennan, 495 F.2d 822, 825 (C.A. 2, 1974). Moreover, it is settled that the Secretary need prove neither specific means of abatement nor their feasibility where violation of a particularizing published standard rather than the general duty clause is involved. Lee Way Motor Freight v. Secretary, 511 F.2d 864,869-70 (C.A. 10, 1975); see National Realty, supra, 489 F.2d at 1268; California Stevedore and Ballast Co. v. OSHRC, supra, 517 F.2d at 988 and n. 1. As this Court noted in rejecting a similar contention, "even if the employer could raise [a] defense... [that compliance with the standard was impossible it] did not meet its burden of showing that other means...[to effect compliance] were not useable." Brennan v. OSHRC and Underhill Const'n. Corp., supra, 513 F.2d at 1036, 1038.

GE's heavy reliance on Brennan v. OSHRC and Alsea Lumber Co. for this aspect of its argument (Br. 35-37) is similarly misplaced. That case involved well-enforced instructions, a "single act" of employee failure to wear safety glasses, and a total lack of evidence that the employer was either on notice of past failures or "had any on-going practice of permitting its instructions to be disregarded." See also n.18, infra.

4. The Commission's finding was particularly warranted because the Act's language and purposes, as well as traditional rules of statutory construction, demonstrate that contrary to GE's contention (Br. 35-37), the burden was on the company to prove it neither knew nor could reasonably have known of the violation, not on the Secretary to disprove these negatives. E.g., Atlas Roofing Co. v. OSHRC, supra, 518 F.2d at 1001-02. Cf N.L.R.B. v. Great Dane Trailers, 388 U.S. 26, 33-34 (1967); N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170, 176-177 (C.A. 2, 1965), cert. den. 384 U.S. 972. Section 17(k) defines a serious violation as one which creates substantial probability of harm "unless the employer did not, and could not with the exercise of reasonable diligence, know of [its] presence"---proviso language which has traditionally been held to create an exemption or affirmative defense which claiming employers must plead and unmistakeably prove. Arnold v. Kanowsky, 361 U.S. 388, 392 (1960); F.T.C. v. Morton Salt Co., 334 U.S. 37, 41-45 (1948); State Wholesale Grocery v. Great A. and P. Tea Co., 258 F.2d 831 (C.A. 7, 1958), cert. den. 358 U.S. 947; U.S. v. Safeway Stores, 252 F.2d 99, 101 (C.A. 9, 1958).[15/] The clause's legislative history indicates it was

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15/As these cases indicate, this rule applies with special force where the exemption sought would vitiate remedial obligations and relevant information is particularly within the employer's knowledge. Accord: N.L.R.B. v. Great Dane Trailers, supra; U.S. v. New York, N.H. and H.R.R. Co., 355 U.S. 253, 256 n. 5(1957); Phillips Co. v. Walling, 324 U.S. 490, 493 (1945); Snow v. NLRB, 308 F.2d 687, 695 (C.A. 9, 1962). Cf. Fed.R.Civ.P.8(c), applicable to these proceedings under 29 U.S.C. 661(f)(matters constituting avoidance or affirmative defense are part of defendant's case rather than plaintiff's); 2A MOORE Para. 8.27[1] at p. 1842; Brennan v. OSHRC and Underhill Const'n. Corp., supra, 513 F.2d at 1037-38.

meant to create such a defense.[16] And Congress' clear intent to require employers to take all reasonable steps to discover and eliminate hazardous conditions[17] logically precludes any holding that the Secretary is required to disprove, rather than the employer to prove, such steps. Atlas Roofing Co. v. OSHRC, supra. GE's contention would accordingly subvert both the pertinent language of 17(k) and that language's purpose.[18]

16/ The Senate-passed bill treated all violations of safety and health standards as serious. Leg. Hist. 156, 175, 265-266, 565. The House-reported bill similarly defined serious violations without affording employers a "knowledge" or diligence defense, explaining that except for "willful violations, the violator's intent would not be a pertinent [element of the violation]...where there is a failure to comply with standards and regulations." Leg. Hist. 836-837, 856, 869-870. The proviso was added to section 17(k) at the last minute without discussion as part of the House-passed Steiger substitute, and was generally adopted by the Conference Committee on the simple ground that division of non-willful violations into defined serious and non-serious categories was preferable. Leg. Hist. 1092, 1103-04, 1112, 1171-72, 1195. However, the Conferees also struck from the Steiger proviso language which might have been construed to place the burden of showing employer knowledge or diligence on the Secretary. Leg. Hist. 1104, 1131, 1171-72.

Nothing in this history indicates Congress meant to alter the traditional meaning of such provisos or to do more than afford employers an affirmative defense to serious-violation charges because the civil penalties involved were mandatory and likely to be higher than for non-serious violations. See California Stevedore and Ballast Co. v. OSHRC, supra.

17/ See, e.g., Brennan v. Butler Lime and Cement Co. and OSHRC, supra, 520 F.2d at 1017 and cases cited; National Realty, supra, 489 F.2d at 1266-68 and nn. 34-38, 41.

See footnote 18/ on next page.

18/ For similar reasons both Alsea Lumber and GE's reliance on it for the proposition that non-serious violations also require affirmative proof of employer knowledge (Br. 33-37 passim) are erroneous. In addition to the fact that Alsea misinterpreted every case that panel principally relied upon, the Act clearly precludes use of employer knowledge as an element of non-serious violations, compare 29 U.S.C. 666(b) and (j) with 666(c); the knowledge proviso was added to 666(j) simply to afford employers a defense against more severe violations likely to involve higher penalties, supra n. 16, see California Stevedore and Ballast Co. v. OSHRC, 517 F.2d 986, 988 (C.A. 9, 1975); and every other court which has considered the matter has concluded that whether the employer knew or could reasonably have known of the violation's presence is "irrelevant to any determination of whether...the Secretary has established a [non-serious] violation." Brennan v. OSHRC and Vy Lactos Laboratories, supra, 494 F.2d at 463. Accord: Arkansas-Best Freight System v. OSHRC and Secretary, ---F.2d---, 3 CCH ESHG Para 20,354 at n.11 (C.A. 8, No. 75-1249, Jan. 29, 1976); Brennan v. Butler Lime, supra, 520 F.2d at n. 10; National Realty, supra, 489 F.2d at n. 41; Brennan v. OSHRC and Interstate Glass Co., 487 F.2d 438, 442 n. 19 (C. A. 8, 1973). The Commission has expressly agreed. E.g., Cam Industries, supra, 1973-74 CCH OSHD Para. 17,373 at p. 21,904.

We further note that Alsea was simply an early judge's decision which became final without Commission review. 29 U.S.C. 661(i). There is accordingly no Commission inconsistency of the type alleged (Pet. Br. 37). But cf. Horne Plumbing and Heating Co. v. OSHRC and Secretary, --- F.2d. --- (C.A. 5, No. 74-3897, dec. Feb. 26, 1976)(dicta).

5. GE finally contends that even if there was a violation it is not "repeated," which must be "something more than a bare recurrence of the same violation" and involve a "flaunt[ing] of the requirements of the Act " (Br. 39-40). This contention is untenable.

We initially note that the enforcing agencies' joint finding of a "repeated" violation constitutes a congruent interpretation of this statutory term which should be accepted by the Court unless wholly irrational. Cases supra, pp. 20-21. See also New York Dep't. of Social Services v. Dublino, 413 U.S. 405, 413-422 (1973); NLRB v. Boeing Co., 412 US 67, 74-75 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 US 205, 210 (1972). The instant determination of a "repeat" violation was both reasonable and required.

In the first place, this case presents a second violation of the same standard, occurring in the same building as GE's earlier violation and involving identical factual circumstances. That violation accordingly occurred "more than once"---the common meaning of "repeated," and one whose application seemsentirely unexceptionable where the quoted term is not specially defined and used in a remedial civil statute which must be construed to assure employee safety "so far as possible." 29 U.S.C. 651. See Peyton v. Rowe, 391 U.S. 54, 65 (1968); American Smelting and Refining Co. v. Brennan, 501 F. 2d 504 (C.A. 8, 1974). Indeed, this

Court has held under similar statutory provisions that violations "must be regarded as 'repeated' "simply because they "did not occur simultaneously" but followed one another. Reese Sales Co. v. Hardin, 458 F. 2d 183, 187 (C.A. 9, 1972). Accord: Zwick v. Freeman, 373 F. 2d 110, 115 (C.A. 2, 1967), cert. denied 389 U.S. 835.

Second, the statute facially permits a far broader interpretation of "repeatedly" than that applied here, since 29 U.S.C. 666(a) states that civil penalties of up to $10,000 may be assessed not only for repeated violations of "any standard" but whenever "Any employer...repeatedly violates the requirements of section 5 of this Act." Section 5 of course includes the general duty clause, 29 U.S.C. 654(a)(1), which applies when no standard does and may be triggered irrespective of whether any standard---let alone the same standard---was violated more than once. See, e.g., National Realty, supra , 489 F. 2d at 1361 and nn. 9, 41; American Smelting and Refining Co. v. Brennan, supra, 501 F. 2d at 512. The Commission affirmance of the judge's conclusion "There can be no question[the second violation was] repeated" because GE violated the same standard in identical circumstances at the same work site was plainly narrower. In fact it rested on the narrowest conceivable circumstances justifying a repeated holding---circumstances

which made unnecessary any treatment of whether a "repeated" violation would exist if the same standard was violated at another company facility by different conduct, or a different standard was violated by similar conduct. That conclusion was a fortiori rational, as well as supported by the record. It should accordingly be affirmed.

Third, and perhaps most importantly, compelling policy reasons support the Commission's repeated violation finding here. Contrary to GE's apparent contention, the Act does not assume that recurrent or even initial violations of standards are fortuitous, since it imposes a non-delegable duty on employers to discover and correct all such violations and presumes they are routinely preventable by appropriate employer action. See, e.g., Brennan v. OSHRC and Gerosa, Inc., supra, 491 F. 2d at 1344-1345; REA Express v. Brennan and OSHRC, supra, 495 F. 2d ad 824-826; Brennan v. Butler Lime, supra. That is why the Act encompasses even minor nonserious violations, and that is why it authorizes the imposition of civil penalties even for initial violations--- penalties which plainly assume that employers have a continuing statutory obligation to eliminate proscribed hazards before an inspector arrives or an accident occurs. E.g., Lee Way Motor Freight v. Secretary, supra, 511 F. 2d at 870; Ryder Truck Lines v. Brennan, supra; Brennan v. OSHRC and

Underhill Const'n Corp., supra, 513 F. 2d at 1039. 19/

It logically follows that employers have an even greater duty to discover and eliminate violations of specific standards which have already been cited and ordered abated; that they cannot simply continue as before in the certainty that violations will be treated no differently than if the initial citation had never issued; and that they cannot, as GE did here, rely on a program they know is not fully working and "appl[y] little or no additional effort to see that [recurring violations] are eliminated" (A. 391a). As the National Realty Court stated in implicitly distinguishing between an employer's duty to discover unsafe conditions and his far higher duty to

19/ See also Brennan v. OSHRC and Vy Lactos Laboratories, supra; National Realty, supra, 489 F. 2d at nn. 6, 34, 36. Cf. section 14(a) of the Federal Environmental Pesticide Control Act of 1972 (FEPCA), 7 U.S.C. 1361(a)(2), authorizing administrative assessment of a civil penalty up to $1,000 against "Any...person...who violates any provision of this subchapter [by misusing pesticides] subsequent to receiving a written warning from the Administrator or following a citation for a prior violation. In considering OSHA Congress clearly rejected similar bills exempting large classes of first-time violations from penalties, in favor of bills mandating penalties for all serious violations and authorizing discretionary penalties for all nonserious ones. See LEG. HIST. 113, 150, 197, 265-66, 565 (Senate); 839, 851-852, 856, 1005-07, 1011, 1057-60, 1091, 1112-15 (House); 1170-71(Conference Committee).

eliminate such conditions once he is on notice they have occurred, even under the general duty clause

> the standard of care imposed...[is] not characterized in terms of reasonableness. Rather, the reports speak of a
>
> general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment.
>
> . . . that employers must take more than merely "reasonable" precautions for the safety of employees follows from the great control which employers exert over [their employees'] conduct and working conditions...

489 F.2d at nn. 34, 41(emphasis in original); cf. Id., at 1266-67. This reasoning applies a fortiori where violation of a specific published standard rather than the general duty clause was involved, and the employer had recently been cited for an identical violation on the same worksite. 20/

20/ GE's reliance on the Commission's "flaunting" language (Br. 11n. 10, 39-40) is clearly misplaced. That language related to repeated non-serious violations occurring at different physical plants at the Schenectady complex, and on the face of the Commission's decision had no relevance to the instant violation. Moreover, even as to the non-serious violations the language was dictum, since the Commission went on to affirm those violations without any finding of "flaunting" by GE. Most importantly, as the Commission later made clear in Bethlehem Steel Corp., OSHRC No. 8392, 3 CCH ESHG Para. 19,996 (Sept. 17, 1975), the "flaunting" language in the instant case does not concern an element of "repeated" violations at all, but goes simply to the amount of the penalty the Commission should assess having found a repeated violation, since

> section 17(a) of the Act permits the assessment of civil penalties up to $10,000 for "repeated" violations. This permits wide

(continued)

(cont.)
discretion for dealing with repetitive violations that may vary greatly as to the remedy needed to achieve compliance. The repetitions may be the consequence of simple negligence, or they may be the result of greater degrees of carelessness or intentional flaunting of the Act's requirements. The latter may warrant the assessment of civil penalties in amounts higher than the general ceiling under section 17 for violations that are not "willful" or "repeated". Cf. General Electric Co. But in any event the assessment of the penalty is an act of discretion, the soundness of which must be measured by the factors listed in section 17(j) and any other reasonable factors.

In short, the Commission has consistently and properly held that violations by the same employer of the same standard under similar factual circumstances fully meet the requirement for a repeated violation, and that flaunting is relevant only to the amount of penalty for such repeated violations. Cf. Lee Way Motor Freight, supra, 511 F. 2d at 870 .

II. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT GE COMMITTED A WILLFUL VIOLATION OF 29 CFR 1910.23(c)(1)

1. As noted supra, in April 1973 the Secretary also cited GE for a willful violation of 29 CFR 1910.23(c)(1), which pertinently provides that "every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing...on all open sides," "platform" being defined as "a working space for persons elevated above the surrounding floor or ground." 29 CFR 1910.21(a)(4). The Commission thereafter affirmed this willful citation and the Secretary's proposed penalty of $2,000. This result was also supported, since it is undisputed that during their inspection in building 273 the compliance officers observed a powered hydraulic platform capable of being raised on a scissors principle to heights of ten feet. Although this platform was not in use at the time, the record contains uncontroverted evidence that it was regularly used once a month for two or three days running, had been purchased with railings and was equipped with sockets for them, but was frequently used for welding at heights of six to eight feet without those railings (A. 63a, 105a, 182a, 224a-226a). Moreover, the foreman in charge of supervising work on this platform for the four months prior to the inspection "could not recall seeing [railings]" used

with it, and his predecessor "hadn't seen [the railings] in years" (A. 179a-180a). On these facts the Commission reasonably inferred that employees were actually exposed to the proscribed falling hazard within six months of the Secretary's citation, and its finding should be affirmed. N.L.R.B. v. United Ins. Co., supra; Olin Const'n. Co. v. OSHRC and Brennan, supra; Brennan v. OSHRC and Underhill Const'n. Corp., supra, 513 F.2d at 1038.[21/]

Moreover, there was a violation even absent direct employee exposure, since this case clearly presents "a situation where...an employer was in control of an area and responsible for its maintenance. . .a hazard had been committed and . . .the area of the hazard was accessible to the employees of the cited employer." Underhill Const'n. Corp., supra. As the Commission most recently noted in finding such potential exposure or access to a "zone of danger" sufficient to

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21/ GE's reliance (Br.46-51) on the contrary conclusion of the judge and dissenting Commissioner does not require a different result. The Commission's disagreement with its judge did not relate to a finding of fact but reflected a different view of the inferences to be drawn from established facts---an area in which its "presumptively broader gauge and experience" has "a meaningful role." Oil, Chemical, and Atomic Workers Local 4-243 v. N.L.R.B., 362 F.2d 943, 946 (C.A. D.C., 1966). See also N.L.R.B. v. Interboro Contractors, 388 F.2d 495, 501 (C.A. 2, 1967), cert. denied, 382 U.S. 926.

support a statutory violation,

> If defective equipment is available for use by the employee and a standard is violated, then a citation should issue. Under such circumstances, the employee is exposed to a potential hazard even if he is not using the equipment at the time of the inspection. The equipment is accessible to him and could be used.

Gilles and Cotting, Inc., OSHRC No. 504, 3 CCH ESHG Para. _____ (Feb. 20, 1976) (on remand).[22/]

2. It is equally clear that violation was willful. As the courts have consistently recognized, a"conscious...voluntary decision, ... regardless of venial motive, properly is described as willful...indifference to the requirements of the law may alone represent a willful statutory violation." Messina Const'n. Corp. v. OSHRC and Secretary, 505 F.2d 701, 702 (C.A. 1, 1974). Accord: U. S. v. Dye Const'n. Co., 510 F.2d 78, 82 (C.A. 10, 1975); Intercounty Const'n. Co. v. OSHRC, 522 F.2d 777, 779-780 (C.A. 4, 1975), cert. den. 96 S.Ct. 854 (1976).[23/] There was clearly such indifference here, since the record shows GE had actual knowledge of the relevant platform-guarding standard, was aware of the hazards to employees resulting from non-compliance, and was on notice of facts indicating this platform presented such a hazard.

22/ GE does not now contest, and it seems plain, that a violation exposing workers to inadvertent falls of six to ten feet onto concrete was "serious." 29 U.S.C. 666(j); see National Realty, supra, 489 F. 2d at n. 33.

23/ See also C.N. Flagg and Co. v. OSHRC and Dunlop, (C.A. 2, No. 74-2362 , Jan. 12, 1976), affirming without opinion OSHRC No. 1734,1974-75 CCH OSHD Para. 18, 686 (1974).

Thus, the company had not only been cited twice before for violations of this standard under different facts, including a citation the week before the instant inspection which was specifically brought to the attention of its safety director, but had been officially informed of numerous other violations for which it was not cited. Moreover an OSHA official had lectured management on the requirements of this standard, and the Union had repeatedly brought additional platform guarding violations to GE's attention. Supra, pp. 3-4 and n. 2.

Notwithstanding these facts, the company not only permitted employees to continue to work on the instant platform without guardrails, but maintained it had a "policy" to assure their use despite the admission of the responsible foremen that the rails had not been seen "in years." On this record---and in light of the Commission's explicit findings that GE's Schenectady facility "has a history of both non-serious and serious violations. . .spanning a fifteen-month period prior to the March 1973 inspection"; the genuineness of its safety efforts "has been put into issue"; "there was no direct contact between management responsible for safety and the Union safety director"; and it "was aware of on-going violations, [but] applied little or no additional

effort to see that they were eliminated" (A. 391a)---the agency's finding of willful indifference was justified.[24/]

24/ GE notes (Br. 58) that the panel in Frank Irey, Jr. v. Brennan and OSHRC, supra, in a passage not addressed by the Third Circuit's en banc affirmance, felt compelled by fear of an unacceptable "overlap" between willful violations and serious violations where the employer "knew" of violative facts, 29 U.S.C. 666(j), to hold that willfulness means deliberate "defiance . . .obstinate refusal to comply." 519 F.2d at 1207. This definition was formulated before, and is inconsistent with, both the uniform holdings of other circuits and this Court's intimations. Cases supra, pp.36-37, n.23. It is also inconsistent with Congressional indications that civil willful violations were to be freely used against indifference to known safety regulations. E.g., Leg. Hist. 425.

More importantly, the Irey result was based on a groundless fear. The essence of willfulness is actual knowledge of a prohibiting regulation---knowledge which must be proved by the Secretary as part of his prima facie case, goes beyond mere knowledge of facts constituting an unsafe condition, and in both respects distinguishes serious from willful violations. See Atlas Roofing Co. v. OSHRC, supra, 518 F.2d at 1003.

3. No different result is required by GE's contention (Br. 52-56) that the Commission erred because this powered work platform was not a "platform" within 23(c)(1), but a "scaffold" under 29 CFR 1910.28, which requires guardrails only at heights over 10 feet. This platform is facially within the applicable definition: "a working space for persons elevated above the surrounding floor or ground, such as a balcony or platform for the operation of machines and equipment." Moreover, contrary to GE's contention, the Commission has never indicated that 23(c)(1) would not apply in accord with its plain language to situations like this one. Indeed, it has repeatedly applied the standard in both identical and substantially similar circumstances. See U. S. Homes, Inc., Sandler-Bilt Division, OSHRC No. 367, 1971-73 CCH OSHD Para. 15,227 (1972); George A. Hormel and Co., OSHRC No. 1410, 1974-75 CCH OSHD Para. 18,685 (1974); Sibley Mill, Deering Milliken, OSHRC No. 8927, 1974-75 CCH OSHD Para. 19,733 (1975).[25/]

25/ The company's contention that 1910.23 applies only to permanent falling hazards while 1910.28 and .29 apply to temporary or infrequently encountered ones (Br. 52-55) cannot prevail. The standard in terms applies to "pit and trapdoor floor openings, infrequently used," as well as temporary floor and wall openings. 29 CFR 1910.23 (a)(5), (a)(7), (b)(4).

4. We finally note GE's implicit contention (Br. 55-56, 60 passim) this violation should be vacated because it had no notice that 23(c)(1) rather than 1910.28 might apply. The contention is both unwarranted and egregious on the facts of this case, which show that the company not only purchased the platform with standard railings, but admitted it knew 23(c)(1) applied by defending on the ground that it had a policy requiring use of these railings and "had to talk to people about their failure to use the rails [with this platform]" (A. 224a-226a). Since 1910.28 requires railings only for scaffolds over ten feet high, and this platform could not be raised over ten feet, GE was necessarily aware, and the Commission properly concluded here, that 23(c)(1) applied.

CONCLUSION

For the above reasons the petition should be denied and the Commission's repeated and willful violation-findings affirmed and enforced forthwith. 29 U.S.C. 660(a).

Respectfully submitted,

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